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U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 29 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a postdoctoral research associate at the University of Pittsburgh (UP), Pennsylvania. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, printouts from a citation database, and a copy of a 2008 job offer letter.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on January 3, 2007. The initial submission included seven witness letters. The first two witnesses were the petitioner's classmates at Norman Bethune University of Medical Science in China; all three graduated in 1983. [redacted], now Senior Manager of Surgical Training and Technical Services at Charles River Laboratories, Raleigh, North Carolina, stated:

> [The petitioner's] research findings have received great response from the scientific community and have facilitated the work of many other scientists. . . .
>
> During her Ph.D. study [at Nippon Medical School, Tokyo, Japan], she learned a great number of theories and techniques of gene therapy. . . . Her modified retroviral vector is very useful for gene therapy of the most promising target disease. In drug resistance study, she found two candidate mechanisms of drug resistance in doxorubicin-resistance cells and demonstrated that the specific inhibitor might overcome drug resistance in resistant cells. Her discovery made a great contribution to increasing survival for chemo-resistant cancer patients. Furthermore, she successfully produced . . . fusion partner cells for production of human monoclonal antibodies. It has been used to produce human antibody. There has not been any human monoclonal antibody in the world so far. So it will benefit all the people in the world.

[redacted] of the University of Miami, Florida, used wording that was very similar, sometimes identical, to [redacted]s language, including the assertion that, prior to the petitioner's Ph.D. research, "[t]here had not been any human monoclonal antibody in the world so far. So it will benefit all the people in the world."

[redacted] of Nippon Medical School also closely echoed the language in [redacted] letter, such as the following passage: "she found two candidate mechanisms of drug resistance in doxorubicin-resistance cells and demonstrated that the specific inhibitor might overcome drug resistance in resistant cells. Her discovery also made a great contribution to increasing survival for chemo-resistant cancer patients." This letter also marks yet another occurrence of the claim "[t]here has not been any human monoclonal antibodies in the world so far. So it will benefit all the people in the world."

[redacted]s stated:

> [The petitioner] joined my research team as a postdoctoral Research Associate at the University of Pittsburgh in May, 2005. At present, she is working on two projects. Both of them are preclinical in utero gene treatment targeting neuromuscular diseases such as Duchenne muscular dystrophy (DMD). . . . [The petitioner] is pursuing in utero gene delivery that could offer the advantage of treatment at an early stage for MD.
>
> [The petitioner's] other project is oligonucleotide-mediated gene repair for the treatment of DMD in utero using the mouse model of DMD. Currently among the gene therapy strategies for DMD, a gene repair approach using oligonucleotides has yielded encouraging results. . . .
>
> With in utero gene delivery, two technical problems have emerged that were addressed by [the petitioner]. One is that [genetically modified] mdx mothers cannibalize almost all the pups post-delivery. The other one is the difficulty in identification of positive

> pups after delivery. [The petitioner] has solved both of these problems by modifying post-surgical analgesia and using fluorescent beads to mark treated pups in utero.

[redacted] stated that the petitioner's doctoral research at NMU "was the first demonstration of the generation of human monoclonal antibodies with the possibility of a large impact on medical care," a somewhat narrower claim than other witnesses' assertion that the petitioner produced the first "human monoclonal antibody in the world." The text of [redacted]' letter alternates between two distinct type fonts, sometimes in the middle of a sentence.

[redacted] stated that the petitioner "is playing a critical role in her current project both technically and intellectually. . . . [The petitioner's] presence in her laboratory is essential to [the] gene treatment in utero project." [redacted] repeated the claim that, prior to the petitioner's doctoral studies in 2000-2004, "[t]here had not been any human monoclonal antibody in the world. So it will benefit all the people in the world."

UP Research Assistant Professor [redacted] stated:

> [The petitioner's] past work . . . has resulted in an appreciable improvement nationally or internationally in the fields of immunology, molecular biology, cellular biology and public health care. [The petitioner's] current research projects . . . are very challenging and intrinsically important. And [the petitioner] is playing a critical role in all two projects both technically and intellectually by performing in utero gene transfer and gene correction.

[redacted] letter contains passages that resemble portions of [redacted] letter, such as the following passage: "In the study of the drug resistance mechanisms of human leukemia cell line, she found two candidate mechanisms of drug resistance in doxorubicin-resistance cells. Her discovery also made a great contribution to increasing survival for cancer patients." [redacted] did not credit the petitioner with the first synthesis of human monoclonal antibodies, but did state that the petitioner's work "will benefit all the people in the world," a phrase found in almost every letter submitted.

Associate [redacted] of Stanford (California) University described the petitioner's work at UP. [redacted] wording is very similar, at times identical, to the wording in [redacted]' letter, although it lacks the shared language found in the majority of the petitioner's initial letters.

We note that the witnesses did not claim that the petitioner was the first to produce one particular variety of human monoclonal antibody. Rather, witnesses asserted, without further clarification or qualification: "There had not been any human monoclonal antibody in the world so far." The record contains no documentary evidence to support the claim that the petitioner produced the first "human monoclonal antibody in the world." The repetition of this claim by several witnesses, in wording that is identical or nearly so, does not enhance the claim's inherent credibility.

The petitioner submitted copies of her research articles, along with documentation of citation of those works. The initial submission showed that citations of the petitioner's work appeared in nine published articles and a doctoral dissertation.

On April 17, 2008, the director issued a request for evidence, stating that the petitioner "must demonstrate [the] ability to serve the national interest to a substantially greater extent than the majority of others in [her] field." In response, the petitioner submitted copies of additional articles and materials relating to various projects.

The petitioner documented a total of 17 citations of articles that she had published between 1998 and 2004. The petitioner did not claim any citation of work she produced after her 2005 entry into the United States. The petitioner's most-cited works (with five citations each) are a 1998 article which the record shows only in Chinese, and a 2003 article from *Pediatrics International*, which was not a research paper but rather a case study regarding a child with a pancreatic tumor.

The petitioner also submitted two new letters. Of the two witnesses, counsel stated:

> One of them has watched [the petitioner's] work closely and the other has gotten to know her accomplishments primarily through her publications and conference presentations as well as through cooperation. As they come from different geographical regions of the United States (e.g. California and Massachusetts), with extensive experience as leader and expert judge of others' work . . . , their words carry special weight as they represent the scientific establishment in the field nationwide.

Neither of the new witness letters is in Massachusetts. One is from the petitioner's mentor at UP, and the other is from one of the petitioner's collaborators. The geographic distance between Pennsylvania and California does not imply that these two witnesses speak on behalf of scientists across the United States.

in her second letter, stated that the petitioner "had made a great progress [*sic*] in her project" and described the petitioner's two research projects at UP, sometimes repeating language from her previous letter. [redacted] added: "Presently, she is collaborating with [redacted] at UCLA, Los Angeles and [redacted] at Stanford University to further study gene correction at the genomic DNA level."

[redacted], Assistant Professor at the David Geffen School of Medicine, University of California, Los Angeles, stated:

> Currently among the gene therapy strategies for DMD, a gene repair approach using oligonucleotides has yielded encouraging results. . . . Gene correction strategies are attractive because of their ongoing benefit to all progeny of the corrected cells. In this study, [the petitioner] is using single strand oligodeoxynucleotides (ssODN) gene correction technology to fetal skeletal muscle in utero, with a goal of gene correction in

> muscle progenitor cells. Her data demonstrate that gene correction of muscle cells *in utero* is feasible. The temporal increase in the number of dystrophin-positive fibers following a single injection of a targeting ssODN and multiple clusters of dystrophin positive fibers supported that muscle precursor cells underwent gene correction *in utero*. These data are incredibly important and have opened a reali[s]tic possibility for the treatment of the disease in thousands of patients in the US and world wide affected by the disease.

The director denied the petition on July 31, 2008, stating that the available evidence did not establish that the petitioner was eligible for the waiver when she filed the petition in January 2007. The director found the petitioner's citation record to be minimal, and that the record does not support what appear to be identical exaggerated claims in various witness letters.

On appeal, counsel asserts that the petitioner had submitted "a large amount of information" "to support [the petitioner's] classification as a member of a profession with advanced degrees and alien with exceptional ability in the field of biomedical sciences." The director did not dispute that the petitioner is a member of the professions holding an advanced degree. Indeed, counsel quoted the director's assertion that "[t]he record establishes that the alien petitioner qualifies as a member of the professions holding an advanced degree." At issue is whether the petitioner qualifies for the national interest waiver, which is an additional benefit over and above the underlying immigrant classification.

On appeal, counsel argues that the stated grounds for denial "are absolutely groundless, reflecting total disregard of relevant documents, unfair treatment, careless and irresponsible examination, and misleading and arbitrary interpretation of the evidence submitted." Counsel then proceeds to catalog the various exhibits in the record. Counsel asserts that the initial submission included "1 letter from [the petitioner's] current employer [and] 6 letters from other US and foreign experts from prestigious institutions." This description is misleading, as it implies a wide range of witnesses not reflected in the record. Three of the seven initial witnesses are on the UP faculty, and all the witnesses have demonstrable ties to the petitioner as classmates, mentors or collaborators.

Counsel tallies the petitioner's published articles and conference presentations, and asserts: "Any one in his right mind would accept such evidence as sufficient to establish a researcher's nationwide and worldwide influence." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's disparaging remarks are not dispositive in this proceeding and cannot take the place of evidence-based argument.

Counsel states: "the officer reviewing the case, out of some dozen and a half publications and presentations, picked one case review with [the petitioner] as the third author, and made much fuss about it." In the director's decision, the AAO can find only one mention, in one sentence, of the "case review" in question. What follows is the complete paragraph containing the passage in question:

> The petitioner's response establishes that in addition to a self-citation by the principal author of the article, a case review published in 2003 of which she was listed as the third author has been cited at least four times by others. The evidence does not indicate that any of her other publications since 2001 have been cited more than twice, nor does it indicate that in total she has been cited twenty times over her twenty year career. Evidence of citations of her research contributions, which not non-existent, is scant and gives little support to her claim of having made breakthroughs of "far-reaching significance" with "national and international impact." It cannot be found that the citation record of the petitioner's work distinguishes her impact on her field from that of other research associates similarly qualified.

Counsel does not explain how the above passage constitutes "much fuss about" the 2003 case review. Commenting further on the above paragraph, counsel states: "the fact is that among the supplemental evidence there is at least one other article cited more than twice." Counsel misreads the director's conclusion, by examining a sentence fragment in isolation rather than in context. The director did not state that only one of the petitioner's articles had "been cited more than twice"; the director stated that only one of the petitioner's articles since 2001 had been cited more than twice. The other article by the petitioner with more than two citations appeared in 1998. The exact specifics are not as important as the main conclusion, which is that the petitioner has not demonstrated the impact of her more recent publications.

On appeal, the petitioner submits new printouts from a Chinese citation database, purporting to show 91 citations of works the petitioner published between 1996 and 2001. Counsel does not explain why this evidence was not provided or even mentioned earlier, when the director specifically requested "documentation of the total current number of citations of each of [the petitioner's] articles by others." Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. We further note that the petitioner provided only summary translations of the printouts. Because the petitioner failed to submit complete, certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). We can, therefore, conclude little about the newly submitted printouts except that they show little interest in the petitioner's work outside of China.

Also on appeal, the petitioner submits a copy of an August 13, 2008 job offer letter, offering the petitioner "a position as a Postdoctoral Associate in the School of Medicine, Division of Endocrinology, at the University of Pittsburgh for an initial term of nine months effective September 1, 2008 to May 31, 2009." The petitioner signed the letter, thereby accepting the job offer. The principal investigator in the project is [redacted] and the project concerns "intracellular lipid and steroid metabolism in systemic metabolic disease." Thus, the record shows that the petitioner has ceased to work with

muscular dystrophy in [redacted] laboratory, although the petitioner's initial national interest claim focused very heavily on that work. It is unclear whether [redacted] even attempted to extend the petitioner's employment in her laboratory, but if she did, the petitioner was evidently uninterested in remaining there.

The new job offer serves to demonstrate that the petitioner remains essentially a trainee at UP, moving from one project to another largely unrelated project, with her work dependent on the research interests of whoever supervises her work at the time rather than her own independent initiative.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.